No. 91-1283

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK GREENBERG, Independent Executor of the Estate of John W. "Jack" McGann,

Petitioner,

—v.—

H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, and GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "any right" in ERISA section 510 applies to all rights provided to a participant or beneficiary by a benefit plan at the time of the contested action, and not merely to vested or "permanent" rights?

2. Whether "discriminate" in ERISA section 510 applies to incidents of retaliation or interference with rights by means of alteration of the terms of a benefit plan?

3. Whether a defense based on a plan sponsor's effort to save costs is unavailable as an absolute defense to an ERISA section 510 claim?

4. Whether ERISA section 510 protects plan participants and beneficiaries against discrimination by means of a disease-specific benefit cap, where that cap has been adopted to retaliate against or interfere with the rights under a plan of a specific individual or specific group of individuals?

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FRANK GREENBERG, Independent Executor
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Frank Greenberg, respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On June 28, 1990, the United States District Court for the Southern District of Texas (Black, J.) entered an opinion granting summary judgment for the defendants. The decision of the district court is reported at 742 F. Supp. 392 and is set forth at p. A34 of the Appendix. The opinion of the Court of Appeals affirming the judgment is published at 946 F.2d 401 and is set forth at p. A1 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1991. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely under 28 U.S.C. § 2101(c).

PERTINENT STATUTE

Plaintiff's claims arise under Section 510 of the Employee Retirement Income

Security Act of 1974 ("ERISA"), Publication Number 93-406, 88 Stat. 832 (29 U.S.C. § 1140)("section 510") which provides in pertinent part as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. ... The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

A. Nature of the Case

In August 1989, plaintiff John McGann, who had been diagnosed as having Acquired Immune Deficiency Syndrome ("AIDS"), commenced this lawsuit to remedy the retaliatory and discriminatory actions taken against him by the defendants, H&H Music Company ("H&H Music" or "McGann's employer"), Brook Mays Music Company ("Brook Mays") and General American Life Insurance Company ("General American") (collectively "the Company"). McGann alleged in his Complaint that, shortly after he submitted claims under the Company's group insurance plan and the Company learned of his illness, the Company conspired to deprive him of further insurance coverage in violation of section 510 of ERISA.

On June 26, 1990, without any discovery having taken place, the district court issued a five-page Order granting summary judgment for the Company. The court ruled that under ERISA the Company had the absolute right to change its group medical insurance plan. The district court also held that the Company did not discriminate against McGann.

The Fifth Circuit affirmed this decision on the grounds that the plaintiff did not adduce evidence of a "right" under the plan, reasoning that the plan allowed for the termination of its terms. The court also found that summary judgment was appropriate because Congress allowed employers discretion to fashion the terms of welfare benefit plans.

B. Facts

McGann had worked for H&H Music since 1982. Until August 1, 1988, one of the critical benefits provided through H&H Music's parent, Brook Mays, to its employees, including McGann, was group medical insurance coverage. The insurance policy, issued by General American, provided for lifetime medical benefits of $1,000,000 to all employees.

In December 1987, McGann was hospitalized for pneumonia. At that time, he learned that he had AIDS. Although personally devastated by this tragic news, McGann took comfort from his knowledge that his medical costs would be substantially covered through his employer-sponsored group health plan.

In late 1987 or early 1988, McGann submitted his first claims for the treatment of his illness. When he

returned to work, McGann informed his employer that he had AIDS. Following the news of his diagnosis, a meeting took place in March 1988 with Company officials and McGann during which McGann's illness was discussed.

Four months after this meeting, the Company issued a letter to employees informing them that, effective August 1, 1988, changes would be made in their medical coverage. In particular, the Company imposed a cap on treatment of AIDS-related illnesses, reducing coverage from $1,000,000 "to $5,000 per individual life time." No such restriction was placed on any other catastrophic illnesses. No other employee was immediately affected by the change of policy.

In accordance with the letter, on August 1, 1988, the Company terminated

its original group insurance plan with General American and replaced it with a self-insured plan. As the letter to employees stated, the plan underwent only minor modifications except for the imposition of a restriction on coverage for AIDS and AIDS-related illnesses -- from $1,000,000 to $5,000[1] -- a

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[1] Under the new plan, AIDS is defined as:

> Acquired Immune Deficiency Syndrome (AIDS): means illness or injury including, but not limited to, the following:
>
> a) pneumonia,
> b) pneumocystis carinii pneumonia,
> c) helminthic infections,
> d) fungal infections,
> e) viral infections,
> f) bacterial infections,
> g) Karposis [sic] sarcoma or other malignancy,
> h) disorder of the body's immune defense system, and
> i) AIDS-related dementia
>
> in connection with exposure to or infection by the HIV or similar virus, as demonstrated by

(continued...)

restriction that immediately affected only McGann. General American administers the new plan.

On August 26, 1988, an agent for General American met with a number of H&H Music employees, including McGann, to discuss the new policy. During that meeting, the agent stated that the change in insurance coverage was the product of three months of negotiation by Company officials. During that same meeting, General American's agent told McGann that there was no way McGann could purchase continuing medical coverage as an individual.

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[1](...continued)
generally recognized blood or diagnostic tests.

AIDS Related Complex (ARC): means two signs or symptoms and two or more laboratory findings consistent with AIDS.

The Company, for purposes of the summary judgment motion, conceded that it intended to terminate the original plan and replace it with the self-insured plan because the Company knew of and did not want to continue to pay for treatment of McGann's illness.

The district court granted summary judgment for the Company. It ruled that the Company has an absolute right to alter the terms of its welfare benefit plans, regardless of its motive in making the changes. Without any discovery having been taken, the district court accepted the Company's defense of cost-savings as a non-discriminatory reason for its action.

C. Court of Appeals Ruling

On appeal, a panel of the Fifth Circuit affirmed the judgment on the grounds that:

(1) the Company's mere assertion of a cost-savings rationale was adequate to satisfy the court that despite its assumption of "a connection between the benefits reduction and either McGann's filing of claims or McGann's revelations about his illness," the Company's actions did not violate section 510;

(2) McGann did not adduce evidence of a "right" under the welfare benefit plan because the plan did not guarantee "permanent" benefits; and

(3) notwithstanding the plain language of section 510, McGann's claim conflicts with the employer's discretion to set the terms of benefit plans.

REASONS FOR GRANTING THE PETITION

POINT I

THE FIFTH CIRCUIT'S NOVEL AND RESTRICTIVE APPLICATION OF SECTION 510 CONFLICTS WITH OTHER CIRCUIT COURTS' DECISIONS THAT SECTION 510 MUST BE CONSTRUED BROADLY TO EFFECT ITS REMEDIAL PURPOSES.

A. The Fifth Circuit's Narrow Construction of "Any Right" in Section 510 Is Not Supported by Decisions of Other Circuits.

Congress enacted ERISA as a remedial statute to protect employees from retaliation and unlawful interference by employers with employee rights under benefit and pension plans. See 29 U.S.C. § 1001(b). Crucial to Congress's enactment is section 510. See Ingersoll-Rand Co. v. McClendon, __ U.S. __, 111 S.Ct. 478, 485, 112 L.Ed.2d 474, 486 (1990). However, the Fifth Circuit's narrow construction of section 510 removes from employees any ability to rely on a benefit plan provided by an employer. This construction undermines

the Congressional intent for ERISA's application to benefit plans and conflicts with decisions by other circuit courts. The Fifth Circuit's decision also has severe negative public policy consequences for coverage for all participants and beneficiaries in employer-sponsored insurance plans.

In affirming the district court's grant of summary judgment for the Company, the Fifth Circuit determined that McGann did not adduce evidence of the existence of "any right to which [he] may become entitled under the plan."[2] McGann v. H&H Music Co., 946 F.2d 401, 405 (5th Cir. 1991). In doing so, the court ruled that section 510's

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[2] The district court did not use this same ground as a basis for its decision; the Fifth Circuit noted that it did not rely on the district court's rationale in rendering its decision. McGann, 946 F.2d at 406 n.8.

prohibition against the interference with "any right" to which a participant or beneficiary "may become entitled" means that it is unlawful to interfere with any employee's right to receive "permanent" benefits under an ERISA plan. See id. at 405. Accordingly, in the Fifth Circuit's view, summary judgment for the defendants was appropriate.

> McGann's allegations show no promised benefit, for there is nothing to indicate that defendants ever promised that the $1,000,000 coverage limit was permanent. ... The continued availability of the $1,000,000 limit was not a right to which McGann may have become entitled for the purposes of section 510.

Id. (emphasis in original).[3]

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[3] As support for its conclusion, the Fifth Circuit defined the word "promised" used in this Court's recent decision, Ingersoll-Rand Co. v. McClendon, __ U.S. __, 111 S.Ct. 478, 485, 112 L.Ed.2d 474, 485-86 to mean "permanent." See McGann, 946 F.2d at 405. In Ingersoll-Rand, this Court held that ERISA preempts a state law claim for wrongful

(continued...)

1. The Fifth Circuit Misconstrued the Plain Language of Section 510.

The plain language of section 510, as well as conflicting decisions of other circuit courts, highlight a critical flaw in the Fifth Circuit's statutory interpretation. The language of section 510 is not confined to pension plans, to "vested" or "permanent" rights, or to plans that the employer has no discretion

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[3](...continued)
termination where the plaintiff alleges that his employment was terminated to prevent the vesting of pension benefits. __ U.S. at __, 111 S.Ct. at 485, 112 L.Ed.2d at 486. In so holding, the Court characterized section 510 as "crucial" to ERISA, pursuant to which a plaintiff may recover, inter alia, mental anguish and punitive damages. See id. at ___, 111 S.Ct. at 481, 484, 486, 112 L.Ed.2d at 482, 486, 488. While the Court noted that a claim like that advanced by McClendon was "prototypical" of the kind Congress intended to cover under Section 510," id. at ___, 111 S.Ct. at 486, 112 L.Ed.2d at 486, it did not require, or even imply, that "vested" or "permanent" benefits must be at issue for all section 510 claims.

to modify or terminate. Rather, the statute makes it unlawful for any "person" to take action against participants or beneficiaries for exercising rights under the provisions of any "employee benefit plan." See 29 U.S.C. § 1140. The statute also forbids actions against employees for the purpose of interfering with the attainment of "any right" to which an employee "may become entitled" under a "plan." Id.[4]

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[4] "[E]mployee benefit plan" and "plan" are defined under ERISA as follows:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. § 1002(3). "[W]elfare benefit plan" is defined as:

> any plan, fund, or program ... established or maintained by an employer or by an employee organization, or by both, to the

(continued...)

In enacting ERISA, Congress explicitly intended to provide protection for employees. See 29 U.S.C. § 1001(a). This Court has affirmed ERISA's broad protective nature.[5] Moreover, because ERISA broadly preempts state laws, section 510 serves as a primary and critical enforcement mechanism to challenge actions that violate the statute's protective intent. See Ingersoll-Rand v. McClendon, __ U.S. at

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[4](...continued)
extent that such plan ... was established or is maintained for the purpose of providing ... through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness....

29 U.S.C. § 1002(1).

[5] See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983)("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.")

__ , 111 S.Ct. at 484-486, 112 L.Ed.2d at 485-88. The Fifth Circuit inappropriately narrowed the breadth of the statute by inserting the word "permanent" where it does not appear.

2. The Fifth Circuit's Decision Highlights A Conflict Among the Circuits.

The Fifth Circuit's restrictive construction of section 510 is at odds with decisions of other circuit courts that have applied the statute's language as written. McGann's petition to this Court should be granted so that this Court can effectuate Congress's intent to maintain uniformity in the application of this law. See Shaw v. Delta Airlines, 463 U.S. at 98-99.

Courts with which the Fifth Circuit is in conflict have ruled that section 510 encompasses claims that a defendant acted to prevent an employee from vesting in an

ERISA plan and claims that a defendant acted to interfere with an employee's ability to accrue additional benefits or to continue to participate in a plan. See Conkwright v. Westinghouse Elec. Co., 933 F.2d 231, 236-38 (4th Cir. 1991); Kross v. Western Elec. Co., 701 F.2d 1238, 1243 (7th Cir. 1983). See also Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988); Zipf v. American Tel. & Tel. Co., 799 F.2d 889, 893 (3d Cir. 1986).[6]

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[6] Some district courts have set forth a narrow view of the scope of section 510, but petitioner submits that these cases, as well as the Fifth Circuit's decision, represent a misreading of the statute. See, e.g., Kelly v. Chase Manhattan Bank, 717 F. Supp. 227 (S.D.N.Y. 1989); Moehle v. NL Indus., Inc. 646 F. Supp. 769, 779 n.6 (E.D.Mo. 1986), aff'd, 845 F.2d 1027 (8th Cir. 1988); Donohue v. Custom Management Corp., 634 F. Supp. 1190, 1197 (W.D.Pa. 1986); Corum v. Farmer Credit Servs., 628 F. Supp. 707, 718 (D.Minn. 1986).

The Conkwright court specifically rejected the argument that section 510 applies only to those cases where an employee has been deprived of the right to "vest" in a benefit plan. It held that the statute extends to actions by "fully vested employees who claim denial not of their vested rights but of their ability to accrue additional benefits." 933 F.2d at 236. The Fourth Circuit reasoned that such a result is necessary to realize fully Congress's intent to protect employees with section 510.

> Extending § 510 to encompass claims brought by vested employees for denial of additional benefits comports with both the legislative language and the intent of Congress to give employees "broad remedies" for violations of pension rights. Section 510 prohibits an employer from discharging an employee "for the purpose of interfering with the attainment of any right to which such participant may become entitled" under a benefit plan. 29 U.S.C. § 1140 (emphasis added). Surely, Congress was not limiting § 510 only to those rights which a

> participant acquires upon vesting, or it easily could have referred to "vested rights." Similarly, the statute refers to rights to which a participant "may become entitled," which is to say that § 510 permits suits for interfering with rights not yet earned. We have no reason to constrict this "broad remedial" provision to only vested rights when the Act clearly contemplates suits to protect any rights implicated by employer action.

Id. at 237 (emphasis in original). Several district courts have also issued rulings consistent with this view. See, e.g., Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 907-08 (W.D.Mich. 1987); Garry v. TRW, Inc., 603 F. Supp. 157 (N.D.Ohio 1985); Folz v. Marriott Corp., 594 F. Supp. 1007, 1014 (W.D.Mo. 1984).

Similarly, circuit courts have ruled that section 510 is violated if action is taken against an employee to interfere with continued medical coverage. See, e.g., Kross v. Western Elec. Co., Inc., 701 F.2d 1238. In Kross, the Seventh

Circuit found a cause of action under section 510 based on an allegation that the plaintiff's employment was terminated to prevent plaintiff's continued coverage under Western Electric's medical insurance plan. 701 F.2d at 1242-43. See also Fitzgerald v. Codex Corp., 882 F.2d 586 (1st Cir. 1989).

District courts also have construed section 510 to cover interference with an employee's continued medical coverage. See, e.g., Folz v. Marriott Corp., 594 F. Supp. 1007. In Folz, the court found liability under section 510 where an employer discharged an employee suffering from multiple sclerosis for the purpose of preventing the employee's further use of the employer's health insurance benefits. In finding for the plaintiff, the court held, relying on Kross, that "[t]he allegation that an employee was

discharged from his employment for the purpose of depriving him of continued participation in the employer's company-provided insurance program states a cognizable claim under § 510 of ERISA." 594 F. Supp. at 1014 (emphasis added). See also Vogel v. Independence Federal Savings Bank, 728 F. Supp. 1210 (D.Md. 1990).

Unlike the Fifth Circuit, the courts in the above cases determined the scope of section 510 by focusing on whether the employee was a participant or beneficiary in an extant plan at the time the employer took its adverse action. They did not read into the statute, as the Fifth Circuit has done, a notion that a benefit somehow must be "permanent." Under the reasoning of these courts, with which the Fifth Circuit is in conflict, McGann would have been able to maintain

his section 510 claim. It was undisputed that McGann was a participant and beneficiary of the Company's welfare benefit plan at the time the Company commenced its scheme to eliminate his medical coverage.

The Fifth Circuit's conflict with other circuit courts compels review by this Court. The Fifth Circuit's failure to explain how logically one may have a "right" under a plan if his or her employment is terminated but would not have such a "right" under the same plan if the plan is altered must be corrected. As discussed, infra, the distinction between plan modification and employment termination is an artificial one.

B. The Fifth Circuit's Narrow Interpretation of the Word "Discriminate" Removes Section 510 Protection from Employees When Alteration of the Plan Rather Than Termination of Employment Constitutes the Employer's Method of Retaliation or Interference.

In rejecting McGann's section 510 claim, the Fifth Circuit indicated its view that an employer may not terminate an employee to interfere with medical coverage but may effect that same purpose by altering the terms of a plan. See McGann, 946 F.2d at 405 n.7. Petitioner contends that if discrimination is not accorded its plain meaning as recognized by other circuit courts, section 510 will offer little protection to health plan participants and beneficiaries, contrary to Congress's intent.

In addition to holding that McGann lacked a "right" within section 510's meaning, the Fifth Circuit rejected

McGann's section 510 claim on the ground that Congress allowed employers the discretion to fashion the terms of welfare benefit plans and therefore could not have intended for the prohibition against discrimination to cover the instant circumstances. The court stated that "[t]o interpret 'discrimination' broadly to include defendants' conduct would clearly conflict with Congress's intent that employers remain free to create, modify and terminate the terms and conditions of employee benefit plans without governmental interference." Id. at 407. The Fifth Circuit's misreading of section 510 effectively removes any significance of the word "discriminate" which Congress deliberately included in the statute.

This rationale implicitly assumes that Congress did not intend the statutory

terms to be accorded their plain meaning, in light of the conflict that becomes readily apparent under the Fifth Circuit's reading of the statute. The court's interpretation suggests that Congress inadvertently rejected any limitation on an employer's discretion to alter a plan while incorporating section 510 to restrict an employer's ability to interfere with an employee's rights under a plan.

To the contrary of this interpretation, Congress expressly considered "the need for flexibility in rejecting the automatic vesting of welfare plans,"[7] yet included without modification the word "discriminate" and did not exempt any type of welfare benefit plan from section 510. Thus, the

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[7] See Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).

legislative intent, as reflected in the statute's plain language, can only indicate that Congress did not intend for employers to have unchecked discretion with respect to setting the terms of welfare benefit plans.

When enacting remedial employment regulation, Congress has recognized repeatedly that such regulations necessarily restrict an employer's exercise of business judgment. See, e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) (violation of NLRA for employer to shut down part of its business if anti-union animus played a part in the decision); Gavalik v. Continental Can Co., 812 F.2d 834, 847 (3d Cir.), cert. denied, 484

U.S. 979 (1987).[8] Here, contrary to the Fifth Circuit's reading of the statute, Congress explicitly limited the employer's discretion to alter the terms of welfare benefit plans by enacting section 510. McGann's claim is in step with such limitation, not in conflict with Congress's intent.

By holding that an employer violates section 510 only by discharging or otherwise disciplining a participant or beneficiary, the Fifth Circuit effectively reads the word "discriminate" out of section 510 as it applies to

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[8] "Just as Title VII does not guarantee employment, section 510 of ERISA does not guarantee [welfare plan] benefits; similarly, as Title VII prohibits discrimination on the basis of race with respect to such employment, so does section 510 prohibit discrimination with respect to [welfare plan] benefits...." Gavalik, 812 F.2d at 847 (quoting McLendon v. Continental Group Inc., 602 F. Supp. 1492, 1503-04 (D.N.J. 1985)).

welfare benefit plans.[9] By proposing the theory that employers are always permitted to alter the terms of welfare benefit plans, the Fifth Circuit ignores Congress's recognition that forms of "discrimination" exist distinct from termination.

Thus, the Fifth Circuit's overly zealous protection of the employer's discretion to change its plan removes the very protection section 510 gives employees. If an employee cannot expect to be treated in a non-discriminatory manner with respect to an insurance policy's lifetime cap simply because the contents of plan terms may be subject to

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[9] The Fifth Circuit acknowledged a number of decisions that recognized section 510 as a cause of action for wrongful termination claims. See McGann, 946 F.2d at 405 n.7, 406. It distinguished them, however, by stating only that the cases were not relevant because they involved "wrongful termination claims brought under section 510." Id.

change at the employer's whim, then section 510 of ERISA is an empty letter when welfare benefit plans are at issue. Congress could not have intended a construction of its statute that would rob its carefully chosen words of their meaning.

POINT II

THE FIFTH CIRCUIT HAS CREATED A UNIQUE AND OVERLY BURDENSOME STANDARD OF PROOF FOR PLAINTIFFS IN SECTION 510 CASES.

The Fifth Circuit "assume[d] that discovery of McGann's condition--and realization of the attendant, long-term costs of caring for McGann--did in fact prompt defendants to reconsider the $1,000,000 limit with respect to AIDS-related expenses to reduce the limit for future such expenses to $5,000."[10]

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[10] The Fifth Circuit also "assume[d] that there was a connection between the benefits reduction and either McGann's filing of claims or his revelations about (continued...)

McGann, 946 F.2d at 405 n.6. According to the court, however, summary judgment was appropriate because McGann allegedly "d[id] not challenge defendants' assertion that their purpose in reducing AIDS benefits was to reduce costs." Id. at 404-05. This ruling effectively elevates a general assertion of cost-savings to an absolute defense, even in those situations where an employer intentionally ties the cost-savings measures to one individual[11] or similarly-situated individuals.

The Fifth Circuit is at odds with other circuits and district courts which

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[10](...continued)
his illness," 946 F.2d at 404, and further "that the defendants knowledge of McGann's illness was a motivating factor in their decision to reduce coverage for AIDS-related expenses...." Id. at 404 n.4.

[11] The Fifth Circuit assumed that "McGann was the only plan beneficiary then known to have AIDS." 946 F.2d at 404 n.4.

have held that evidence of cost-savings supports, rather than refutes, a section 510 claim. See, e.g., Gavalik v. Continental Can Co., 812 F.2d at 857 n.39 ("[s]ection 510's essential purpose is to prevent employers from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company); Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278, 281 (2d Cir. 1987) (evidence of $60,000 in cost-savings supports finding of unlawful motivation under section 510). See also, e.g., Folz v. Marriott Corp., 594 F. Supp. at 1015-16 (violation of section 510 where, inter alia, there was a "substantial economic incentive" for defendant to discharge plaintiff, i.e., the savings of payments from

defendant's self-funded medical, disability and salary continuation plans).

The Fifth Circuit's rationale also conflicts with rulings of other circuits on the use of circumstantial evidence to show discrimination. While citing cases which have held that a section 510 plaintiff must prove a defendant's "specific discriminatory intent as an essential element" of the claim, McGann, 946 F.2d at 404,[12] the Fifth Circuit disregarded the critical reasoning underlying those holdings. A plaintiff may prove "specific intent" with circumstantial evidence, and such intent

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[12] Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 881 (9th Cir. 1989), cert. denied, __ U.S.__, 111 S.Ct. 53, 112 L.Ed.2d 28 (1990); Clark v. Resistoflex Co., a Div. of Unidynamics Corp., 854 F.2d 762, 770 (5th Cir. 1988); Dister v. Continental Group Inc., 859 F.2d at 1111; Gavalik v. Continental Can Co., 812 F.2d at 851.

is proved if it was "a motivating factor" in the defendant's decision to act. Id. at 404 n.4 (emphasis added). As noted, the Fifth Circuit assumed that the discovery of McGann's illness and McGann's filing claims prompted the Company's acts to effectuate a cutoff of McGann's right to make additional claims under the existing policy. Under the rationale controlling those decisions with which the Fifth Circuit is in conflict, McGann adduced sufficient evidence to allow a reasonable fact finder to find a section 510 violation.[13]

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[13] Nor, as the Fifth Circuit found, did the Company's intent become any less invidious or "specific" merely because the acts it directed at McGann also may have affected other persons similarly-situated or potentially similarly-situated to McGann. McGann, 946 F.2d at 404-06. No court has ever ruled that a law is violated only when a single person is affected by a defendant's discriminatory act. Cf. Personnel Administrator of Mass. v. Feeney, 442 (continued...)

POINT III

IMPORTANT PUBLIC POLICY REASONS EXIST FOR GRANTING THE PETITION.

By rejecting a section 510 cause of action against an employer who altered a plan to cut coverage of only one disease, the Fifth Circuit undermined the security of all ill or potentially-ill employees. The court's decision effectively encourages employers to discriminate against one employee or one class of employees solely on the basis of the class members' particular disease and

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[13](...continued)
U.S. 256, 277-79 (1979) ("Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration.... 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

resulting need for the benefits. The Company's institution of an AIDS-related coverage cap reflects the unconscionable notion that only employees with "acceptable" diseases may have access to employer-provided health benefits. Nowhere within ERISA did Congress sanction such a concept.

The Fifth Circuit's narrowing of the scope of section 510 for employees, and the consequential expansion of employers' discretion under ERISA, threatens to worsen the current national crisis in health care. Not only does the decision undercut ERISA's broad protection to employees originally intended by Congress, see 29 U.S.C. § 1001(a), but it also endangers the security of the insurance package of any employee who is similarly-situated to all other employees

except for the specific disease he or she happens to contract.

The Fifth Circuit's decision takes away the security that Congress gave to employees with ERISA. Congress provided for "remedies, sanctions, and ready access to the Federal courts," 29 U.S.C. § 1001(b), because it found

> that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; ... that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; ... that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits ... and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a) (emphasis added).

Although the immediate crisis precipitating ERISA's enactment in 1974 concerned pension plans, Congress recognized the importance of regulating all types of employee benefit plans, including those that provide medical coverage or other benefits related to sickness and disability. 29 U.S.C. § 1002(1). The Fifth Circuit's suggestion that an employer has unchecked freedom to change its welfare benefits plan eviscerates ERISA's anti-discrimination cause of action. See McGann, 946 F.2d at 406-07.

The Fifth Circuit also accepted the Company's assertion that AIDS care was simply too expensive to be included in the Company's benefits package despite the fact that discriminatory intent clearly was underlying the decision. See id. at 404. In fact, in comparison to

other chronic conditions, AIDS care is not especially expensive.[14] Other options, such as reducing the level of coverage under a lifetime cap for all employees, could have accomplished the Company's cost-savings goal equally well. Rather, the Company chose to maintain lifetime coverage of up to $1 million for any medical care, so long as that care is

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[14] The average lifetime cost of HIV disease, from initial infection to death, is $85,000. Cost of AIDS Care in U.S. Is Seen at $5.8 Billion in '91, N.Y. Times, June 20, 1991, at A16 (reporting study by Dr. Fred J. Hellinger, Agency for Health Care Policy and Research, United States Department of Health and Human Services).

According to estimates from the mid-1980's, one case of end-stage kidney disease costs, on average, $158,000; paraplegia from an automobile crash costs an average of $68,700; and myocardial infarction costs an average of $66,800. Fox & Thomas, AIDS Cost Analysis and Social Policy, 15 Law, Med. & Health Care 186, Appendix Table 7 (Winter 1987/88), cited in Leonard, AIDS, Employment and Unemployment, 49 Ohio St. L.J. 929, 959 n.220 (1989). See also Pascal, The Costs of Treating AIDS Under Medicaid 1986-1991 23 (Rand Corporation 1987).

not related to the human immunodeficiency virus (HIV). That coverage was cut only for AIDS-related care illustrates the invidious prejudice of the Company against McGann and members of groups at greatest risk of contracting HIV.

Section 510 is a critical enforcement mechanism in circumstances such as those of McGann. It is especially necessary to counter discrimination where that discrimination is driven by unfounded and irrational fears associated with an "unpopular" disease such as AIDS.

In addition to removing protection from vulnerable individuals who suffer from specific diseases, the Fifth Circuit's decision further weakens the precarious position of employees covered under any health care insurance plan. The threat implicit in the Fifth Circuit's decision extends beyond the

membership of particular groups who, at least for the time being, are likely to lose benefits. The ultimate effect of this decision is to render insecure **any** employee's ability to rely on continued coverage once he or she makes a claim.

According to the Fifth Circuit, insurance providers, such as the Company, may freely offer cost reduction as the driving rationale for excising AIDS-related expenses from catastrophic illness coverage. Following this reasoning, they must also be free to restrict coverage of heart disease, Alzheimer's disease, particular types of cancer, or any other illness that may "cost too much." The Fifth Circuit's interpretation secures for employers an unrestricted ability to choose not only which benefits to offer but also which diseases and individuals "deserve"

coverage and which do not, even in response to one employee's submission of claim forms.

As a result of this Court's broad interpretation of ERISA's preemptive powers, see Shaw v. Delta Airlines, Inc., 463 U.S. 85, ERISA remains as virtually the only protection for employees under covered insurance plans. The Fifth Circuit's sanctioning the removal of one disease from a benefits package following an employee's filing of a claim not only leaves vulnerable those with AIDS and other catastrophic illnesses but also transforms ERISA's existing guardianship powers to an empty promise of protection.

Moreover, the Fifth Circuit's decision signals employers that they may shift to self-insured plans to avoid paying for particular diseases. Employers already seek to evade even minimal regulations

that states impose on commercial insurance by switching from traditional group health plans to self-insured arrangements.[15] The decision thus presents an especially grave danger to the possibility of non-discriminatory medical care coverage. It will open the floodgates for employers to leave state regulation behind and seek comfort in the ability to promise employees the world in benefits and deliver on nothing.

As a consequence of the high level of employer cutbacks in benefits and other employment perquisites, most employees are already vulnerable to unmanageable health care expenses and limited

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[15] Self-insured plans encompass more than half of all workers, as well as their spouses and dependents, amounting to over half of the population of the United States. Pear, Court Approves Cuts in Benefits in Costly Illness, N.Y. Times, Nov. 27, 1991, at A1, col. 2 (citing a report by the Health Insurance Association of America).

insurance coverage.[16] Employers are aware that in light of currently high unemployment rates, their offers of health benefits inhibit many employees from changing jobs or challenging benefits decisions.[17] A crisis exists

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[16] [Health care] cost increases have threatened the stability of the entire system.... In the face of massive cost increases, insurer and employer interest in 'cost containment' has, in part, shifted from pooling and insurance arrangements ... to patient and provider behavior ... and, above all, to 'cost-shifting' to those who use health care services.

Padgug & Oppenheimer, AIDS, Health Insurance, and the Crisis of Community, 5 Notre Dame J. L. Ethics & Pub. Pol'y 35, 39 (1990) (Padgug & Oppenheimer). See N.Y. Times, May 1, 1991, at D23 ("[S]o far it is the workers more than the corporations who are largely footing the mounting health care bills, data show.").

[17] Wasik, Special Report: The Crisis in Health Insurance, Consumers Digest 49, 53 (Aug. 1991)(An estimated 15 to 20 million Americans are refusing to change jobs for fear of losing health benefits.). See also N.Y. Times, Apr. 28, 1991, at A1 (This phenomenon, commonly known as "job lock," is spreading rapidly throughout the United States.).

in medical coverage not only for the 37 million Americans who lack any form of health insurance[18] but also for the large numbers of Americans with inadequate coverage.[19] Under the health insurance system currently in place in the United States, it not only violates ERISA but also is unconscionable to enable employers to circumscribe from an

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[18] Aukerman, Access to Health Care for the Uninsured: The Perspective of the American Academy of Family Physicians, 265 J. A.M.A. 2856 (June 5, 1991).

[19] Several million additional Americans are seriously underinsured. A 1985 estimate from data projected by the 1977 National Health Care Expenditures Study indicated that 26% of the non-elderly population, or approximately 56 million people in 1984, were "inadequately protected against the possibility of large medical bills." That number has increased steadily over the past fifteen years. Friedman, The Uninsured: From Dilemma to Crisis, 265 J. A.M.A. 2491, 2492 (May 15, 1991). Moreover, "within the next three years, more than one out of every four Americans are likely to find themselves uninsured for a significant period of time." Washington Post, June 3, 1991, at A9.

insurance plan those who have sought or may seek reimbursement for certain diseases as provided under their employer's medical insurance plan. The decision's consequences are especially stark in light of the circumstances of McGann who was as much in need of coverage as other individuals with similarly catastrophic and potentially more costly diseases. The Fifth Circuit's decision both underscores and enhances the vulnerability of this sector.[20]

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[20] See Washington Post, Jan. 6, 1991, at H11 ("employers are switching to self-insurance and then capping benefits for AIDS and related ailments at a fraction of what is allowed for other physical illness"); Padgug & Oppenheimer at 41 ("insurers or self-insured groups have attempted to impose unrealistically low caps on payments for AIDS or for AIDS-related drug therapies, caps that have not been used for any other major disease"); L.A. Times, June 9, 1991, at D7 ("many self-insured firms continue to limit or exclude coverage for AIDS, gay advocates say").

CONCLUSION

Because the Fifth Circuit's narrow interpretation of the reach of section 510 of ERISA conflicts with the plain language of the statute, Congress's intent and other circuits' interpretations, and because it threatens access to health care for the most vulnerable set of insured Americans who are already facing a crisis in medical coverage, we respectfully submit that

this Court grant petitioner's request for a writ of certiorari.

Dated: February 3, 1992
New York, New York

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APPENDIX

John MCGANN, Plaintiff-Appellant

v.

H & H MUSIC COMPANY, et al.,

Defendants-Appellees.

No. 90-2672.

United States Court of Appeals

Fifth Circuit

Nov. 4, 1991

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD, JONES, and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant John McGann (McGann) filed this suit under section 510 of the Employee Retirement Income Security Act of 1974, Pub.L. No. 93-406, 88 Stat. 832 (29 U.S.C. §§1001-1461) (ERISA) against defendants-appellees H & H Music Company

(H & H Music), Brook Mays Music Company (Brook Mays) and General American Life Insurance Company (General American) (collectively defendants) claiming that they discriminated against McGann, an employee of H & H Music, by reducing benefits available to H & H Music's group medical beneficiaries for treatment for acquired immune deficiency syndrome (AIDS) and related illnesses. The district court granted defendants' motion for summary judgment on the ground that an employer has an absolute right to alter the terms of medical coverage available to plan beneficiaries. 742 F.Supp. 392. We affirm.

FACTS AND PROCEEDINGS BELOW

McGann, an employee of H & H Music, discovered that he was afflicted with AIDS in December 1987. Soon thereafter,

McGann submitted his first claims for reimbursement under H & H Music's group medical plan, provided through Brook Mays, the plan administrator, and issued by General American, his plan insurer, and informed his employer that he had AIDS. McGann met with officials of H & H Music in March 1988, at which time they discussed McGann's illness. Before the change in the terms of the plan, it provided for lifetime medical benefits of up to $1,000,000 to all employees.

In July 1988, H & H Music informed its employees that, effective August 1, 1988, changes would be made in their medical coverage. These changes included, but were not limited to, limitation of benefits payable for AIDS-related claims

to a lifetime maximum of $5,000.[21] No limitation was placed on any other catastrophic illness. H & H Music became self-insured under the new plan and General American became the plan's administrator. By January 1990, McGann had exhausted the $5,000 limit on coverage for his illness.

In August 1989, McGann sued H & H Music, Brook Mays and General American under section 510 of ERISA, which provides, in part, as follows:

"It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a

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[21] Other changes included increased individual and family deductibles, elimination of coverage for chemical dependency treatment, adoption of a preferred provider plan and increased contribution requirements.

participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan, ... or for the purpose of interfering with the attainment of any right to which such a participant may become entitled under the plan..." 29 U.S.C. §1140.

McGann claimed that defendants discriminated against him in violation of both prohibitions of section 510.[22] He claimed that the provision limiting coverage for AIDS-related expenses was directed specifically at him in retaliation for exercising his rights under the medical plan and for the

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[22] McGann also asserted various state law claims which the district court dismissed without discussion. McGann's brief in this court states that he "does not appeal from that part of the [district] court's order."

purpose of interfering with his attainment of a right to which he may become entitled under the plan.

Defendants, conceding the factual allegations of McGann's complaint, moved for summary judgment.[23] These factual allegations include no assertion that the reduction of AIDS benefits was intended to deny benefits to McGann for any reason which would not be applicable to other beneficiaries who might then or thereafter have AIDS, but rather that the reduction was prompted by the knowledge of McGann's illness, and that McGann was

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[23] General American claimed that the district court should have dismissed it as a defendant with respect to McGann's ERISA claim because ERISA does not create a cause of action against a nonemployer and McGann has never been employed by General American. Because of our disposition of this appeal on alternative grounds, we do not find it necessary to address this issue.

the only beneficiary then known to have AIDS.[24] On June 26, 1990, the district court granted defendants' motion on the ground that they had an absolute right to alter the terms of the plan, regardless of their intent in making the alterations. The district court also held that even if the issue of discriminatory motive were relevant, summary judgment would still be proper because the defendants' motive was to ensure the future existence of the plan and not specifically to retaliate against McGann or to interfere with his exercise of future rights under the plan.

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[24] We assume, for purposes of this appeal that the defendants' knowledge of McGann's illness was a motivating factor in their decision to reduce coverage for AIDS-related expenses, that this knowledge was obtained either through McGann's filing of claims or his meetings with defendants, and that McGann was the only plan beneficiary then known to have AIDS.

DISCUSSION

[1] McGann contends that defendants violated both clauses of section 501 by discriminating against him for two purposes: (1) "for exercising any right to which [the beneficiary] is entitled," and (2) "for the purpose of interfering with the attainment of any right to which such participant may become entitled" In order to preclude summary judgment in defendants' favor, McGann must make a showing sufficient to establish the existence of a genuine issue of material fact with respect to each material element on which he would carry the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

[2] At trial, McGann would bear the burden of proving the existence of

defendants' specific discriminatory intent as an essential element of either of his claims. Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 881 (9th Cir. 1989) (employee must prove employer's specific intent to retaliate for employee's exercise of rights under plan), cert. denied, ___ U.S. ___, 111 S.Ct. 53, 112 L.Ed.2d 28 (1990); Clark v. Resistoflex Co., a Div. of Unidynamics Corp., 854 F.2d 762, 770 (5th Cir. 1988) (employee must prove specific intent to interfere with employee's pension rights); Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988) (section 510 claimant must prove specific intent to engage in activity prohibited by section 510); Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir.) (claimant must prove specific intent to violate ERISA), cert. denied, 484 U.S.

979, 108 S.Ct. 495, 98 L.Ed.2d (1987). Thus, in order to survive summary judgment McGann must make a showing sufficient to establish that a genuine issue exists as to defendants' specific intent to retaliate against McGann for filing claims for AIDS-related treatment or to interfere with McGann's attainment of any right to which he may have become entitled.

[3] Although we assume there was a connection between the benefits reduction and either McGann's filing of claims or his revelations about his illness, there is nothing in the record to suggest that defendants' motivation was other than as they asserted, namely to avoid the expense of paying for AIDS treatment (if not, indeed, also for other treatment), no more for McGann than for any other

present or future plan beneficiary who might suffer from AIDS. McGann concedes that the reduction in AIDS benefits will apply equally to all employees filing AIDS-related claims and that the effect of the reduction will not necessarily be felt only by him. He fails to allege that the coverage reduction was otherwise specifically intended to deny him particularly medical coverage except "in effect." He does not challenge defendants' assertion that their purpose in reducing AIDS benefits was to reduce costs.

[4] Furthermore, McGann has failed to adduce evidence of the existence of "any right to which [he] may become entitled under the plan." The right referred to in the second clause of section 510 is not simply any right to which an employee

may conceivably become entitled, but rather any right to which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the employer. "Congress viewed [section 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990) (emphasis added.

McGann's allegations show no promised benefit, for there is nothing to indicate that defendants ever promised that the $1,000,000 coverage limit was permanent. The H & H Music plan expressly provides: "Termination or Amendment of Plan: The Plan Sponsor may terminate or amend the Plan at any time or terminate any benefit

under the Plan at any time." There is no allegation or evidence that any oral or written representations were made to McGann that the $1,000,000 coverage limit would never be lowered. Defendants broke no promise to McGann. The continued availability of the $1,000,000 limit was not a right to which McGann may have become entitled for the purposes of section 510.[25] To adopt McGann's contrary construction of this portion of section 510 would mean that an employer could not effectively reserve the right to amend a medical plan to reduce benefits respecting subsequently incurred medical expenses, as H & H Music did here, because such an amendment would

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[25] McGann does not claim that he was not fully reimbursed for all claimed medical expenses incurred on or prior to August 1, 1988; or that the full $5,000 has not been made available to him in respect to AIDS related medical expenses incurred by him on or after July 1, 1988.

obviously have as a purpose preventing participants from attaining the right to such future benefits as they otherwise might do under the existing plan absent the amendment. But this is plainly not the law, and ERISA does not require such "vesting" of the right to a continued level of the same medical benefits once those are ever included in a welfare plan. See Moore v. Metropolitan Life Insurance Co., 856 F.2d 488, 492 (2d Cir. 1988).

McGann appears to contend that the reduction in AIDS benefits alone supports an inference of specific intent to retaliate against him or to interfere with his future exercise of rights under the plan. McGann characterizes as evidence of an individualized intent to discriminate the fact that AIDS was the

only catastrophic illness to which the $5,000 limit was applied and the fact that McGann was the only employee known to have AIDS. He contends that if defendants reduced AIDS coverage cause they learned of McGann's illness through is exercising of his rights under the plan by filing claims, the coverage reduction therefore could be "retaliation" for McGann's filing of the claims.[26] Under McGann's theory, any reduction in employee benefits would be impermissibly discriminatory if motivated by a desire to avoid the anticipated costs of continuing to provide coverage for a particular beneficiary. McGann

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[26] We assume that discovery of McGann's condition-and realization of the attendant, long-term costs of caring for McGann-did in fact prompt defendants to reconsider the $1,000,000 limit with respect to AIDS-related expenses and to reduce the limit for future such expenses to $5,000.

would find an implied promise not to discriminate for this purpose; it is the breaking of this promise that McGann appears to contend constitutes interference with a future entitlement.

McGann cites only one case in which a court has ruled that a change in the terms and conditions of an employee-benefits plan could constitute illegal discrimination under section 510.[27] Vogel v. Independence Federal Sav. Bank, 728 F.Supp. 1210 (D.Md. 1990). In Vogel,

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[27] Additionally, McGann relies on three cases involving wrongful termination claims brought under section 510. Fitzgerald v. Codex Corp., 882 F.2d 586 (1st Cir. 1989); Kross v. Western Electric Co.,701 F.2d 1238 (7th Cir. 1983); Folz v. Marriott Corp., 594 F.Supp. 1007 (W.D.Mo. 1984). In none of these cases, however, did the employer alter the terms or conditions of the plan at issue. Nor did any one of the three suggest that the changing of the terms of the plan might constitute a violation of section 510.

however, the plan change at issue resulted in the plaintiff and only the plaintiff being excluded from coverage. McGann asserts that the Vogel court rejected the defendant's contention that mere termination of benefits could not constitute unlawful discrimination under section 510, but in fact the court rejected this claim not because it found that mere termination of coverage could constitute discrimination under section 510, but rather because the termination at issue affected only the beneficiary. Id. at 1225. Nothing in Vogel suggests that the change there had the potential to then or thereafter exclude any present or possible future plan beneficiary other than the plaintiff. Vogel therefore provides no support for the proposition that the alteration or termination of a medical plan could alone sustain a

section 510 claim. Without necessarily approving of the holding in Vogel, we note that it is inapplicable to the instant case. The post-August 1, 1988 $5,000 AIDS coverage limit applies to any and all employees.[28]

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[28] As noted, the district court stated as one ground for its decision that an employer has an absolute right to alter the terms of an employee benefits plan, barring contractual provisions to the contrary. See Deeming v. American Standard, Inc., 905 F.2d 1124, 1127 (7th Cir. 1990) ("allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way" is "a fundamental prerequisite to a §510 action"); Owens v. Storehouse, Inc., No. 1:90-CV-2292-JOF, slip op. at 4, ___ F.Supp. ___, ___ (N.D.Ga., June 28, 1991) (relying on Deeming in rejecting claim that employer violated section 510 by reducing AIDS benefits from $1,000,000 to $25,000 under employee health plan on ground that "§510 was designed to protect the 'employment relationship,' not the integrity of specific plans.") We do not find it necessary to decide this question.

McGann effectively contends that section 510 was intended to prohibit any discrimination in the alteration of an employee benefits plan that results in an identifiable employee or group of employees being treated differently from other employees. The First Circuit rejected a somewhat similar contention in Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12 (1st Cir.), cert. denied, 469 U.S. 1017, 105 S.Ct. 431, 83 L.Ed.2d 357 (1984). In Aronson, an employer eliminated a profit sharing plan with respect to employees at only one of two plants. The disenfranchised employees sued their employer under section 510, claiming that partial termination of the plan with respect to employees at one plant and not at the other constituted illegal discrimination.

The court rejected the employees' discrimination claim, stating in part:

"[Section 510] relates to discriminatory conduct directed against individuals, not to actions involving the plan in general. The problem is with the word 'discriminate.' An overly literal interpretation of this section would make illegal any partial termination, since such terminations obviously interfere with the attainment of benefits by the terminated group, and, indeed, are expressly intended so to interfere.... This is not to say that a good plan could not be discriminatorily modified, intentionally benefitting, or injuring, certain identified employees or a certain group of employees, but a partial termination cannot constitute

discrimination per se. A termination that cuts along independently established lines-here separate divisions-and that has a readily apparent business justification, demonstrates no invidious intent." Id. at 16 (citation omitted).

The Supreme Court has observed in dictum: "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 2897, 77 L.Ed.2d 490 (1983). See also Sejman v. Warner-Lambert Co., 889 F.2d 1346, 1348-49 (4th Cir. 1989), cert. denied, ___U.S.___, 111 S.Ct. 43, 112 L.Ed.2d 19 (1990); Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th

Cir.), cert. denied, 488 U.S. 981, 109 S.Ct. 529, 102 L.Ed.2d 561 (1988); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986), cert. denied, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987); Hamilton v. Travelers Ins. Co., 752 F.2d 1350, 1351-52 (8th Cir. 1985); Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740, F.2d 454, 456 (6th Cir. 1984) (Reynolds Metals), cert. denied, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985). To interpret "discrimination" broadly to include defendants' conduct would clearly conflict with Congress's intent that employers remain free to create, modify and terminate the terms and conditions of employee benefits plans without governmental interference.

The Sixth Circuit, in rejecting a challenge to an employer's freedom to choose the terms of its employee pension plan stated that "[i]n enacting ERISA, Congress continued its reliance on voluntary action by employers by granting substantial tax advantages for the creation of qualified retirement programs. Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation. Absent a violation of federal or state law, a federal court may not modify a

substantive provision of a pension plan." Id. (citation omitted) (emphasis in original).

The Sixth Circuit has subsequently declared that "the principle articulated in [Reynolds Metals] applies with at least as much force to welfare plans..." Musto v. American General Corp., 861 F.2d 897, 912 (6th Cir. 1988), cert. denied 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989).[29]

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[29] Musto involved an ERISA claim by retirees that their former employer violated contractual and fiduciary duties by changing the terms of their medical coverage. The court rejected plaintiffs' claim that they had a vested interest in the terms of their medical coverage. Musto, like Reynolds Metals, noted that "[t]here is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second." Id. at 911.

As persuasively explained by the Second Circuit, the policy of allowing employers freedom to amend or eliminate employee benefits is particularly compelling with respect to medical plans:

"With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These

unstable variables prevent accurate predictions of future needs and costs." Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2nd Cir. 1988) (Metropolitan Life).

In Metropolitan Life, the court rejected an ERISA claim by retirees that their employer could not change the level of their medical benefits without their consent. The court stated that limiting an employer's right to change medical plans increased the risk of "decreas[ing] protection for future employees and retirees." Id. at 492; see also Reynolds Metals, 740 F.2d at 457 ("judicial interference into the establishment of pension plan provisions...would serve only to discourage employers from creating voluntarily pension plans") (footnote omitted).

McGann's claim cannot be reconciled with the well-settled principle that Congress did not intend that ERISA circumscribe employer's control over the content of benefits plans they offered to their employees. McGann interprets section 510 to prevent an employer from reducing or eliminating coverage for a particular illness in response to the escalating costs of covering an employee suffering from that illness. Such an interpretation would, in effect, change the terms of H & H Music's plan. Instead of making the $1,000,000 limit available for medical expenses on an as-incurred basis only as long as the limit remained in effect, the policy would make the limit <u>permanently</u> available for all medical expenses as they might thereafter be incurred because of a single event, such as the contracting of AIDS itself.

Under McGann's theory, defendants would be effectively proscribed from reducing coverage for AIDS once McGann had contracted that illness and filed claims for AIDS-related expenses. If a federal court could prevent an employer from reducing an employee's coverage limits for AIDS treatment once that employee contracted AIDS, the boundaries of judicial involvement in the creation, alternation or termination of ERISA plans would be sorely tested.

[5] As noted, McGann has failed to adduce any evidence of defendants' specific intent to engage in conduct proscribed by section 510. A party against whom summary judgment is ordered cannot raise a fact issue simply by stating a cause of action where defendants' state of mind is a material

element. Clark, 854 F.2d at 771. "'There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim.'" Id. at 771 (quoting Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975), cert. denied, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976)).

[6, 7] Proof of defendants' specific intent to discriminate among plan beneficiaries on grounds not proscribed by section 510 does not enable McGann to avoid summary judgment. ERISA does not broadly prevent an employer from "discriminating" in the creation, alteration or termination of employee benefits plans; thus, evidence of such intentional discrimination cannot along sustain a claim under section 510. That section does not prohibit welfare plan

discrimination between or among categories of diseases. Section 510 does not mandate that if some, or most, or virtually all catastrophic illnesses are covered, AIDS (or any other particular catastrophic illness) must be among them. It does not prohibit an employer from electing not to cover or continue to cover AIDS, while covering or continuing to cover other catastrophic illnesses, even though the employer's decision in this respect may stem from some "prejudice" against AIDS or its victims generally. The same, of course, is true of any other disease and its victims. That sort of "discrimination" is simply not addressed by section 510. Under section 510, the asserted discrimination is illegal only if it is motivated by a desire to retaliate against an employee or to deprive an employee of an existing

right to which he may become entitled. The district court's decision to grant summary judgment to defendants therefore was proper. Its judgment is accordingly

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-2672

JOHN MCGANN,

Plaintiff-Appellant,

versus

H & H MUSIC COMPANY,

ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before GARWOOD, JONES and BARKSDALE, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION THEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Courtin this case is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

November 4, 1991

ISSUED AS MANDATE: November 26, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN MCGANN	§	
	§	
Plaintiff	§	
	§	CIVIL ACTION NO.
	§	H-89-1995
VS.	§	
	§	
H & H MUSIC COMPANY, et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Pending before the Court is a motion for summary judgment filed by Defendants H & H Music Company, Brook Mays Music Company and General American Life Insurance Company. After consideration of said motion and the response filed by Plaintiff John McGann, the Court is of the opinion that there is no genuine issue of material fact in this case, and that, for the reasons discussed below, Defendants' motion should be granted.

Statement of the Case

John McGann brought this claim of discrimination and violation of his rights under ERISA against his employer, H & H Music Company Brook Mays Music Company and the insurance company that administers his medical plan, General American Life Insurance Company. He alleges that because Defendants changed portions of the group medial care plan they violated ERISA, 29 U.S.C. §1001 et seq.

McGann began working for Defendant H & H Music Company in 1982. In December of 1987 he was diagnosed as having A.I.D.S. and informed Defendant of his diagnosis. In July of 1988 Defendants made changes in their health insurance program. Previously employees that were diagnosed with A.I.D.S. were entitled to maximum benefits of $1,000,000.00 during their

lifetime. The new plan decreased A.I.D.S. benefits to a maximum of $5,000.00 and also discontinued benefits for chemical dependency. In addition, in July 1988, the medical coverage changed from fully insured to self-insured. McGann after learning of the changes in the plan filed suit.

Summary Judgment

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party

will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

Discussion

The paramount purpose of ERISA is to protect the solvency of employee benefit plans to ensure that the valid claims of employees and their beneficiaries will be paid. Orchard Creek Hospital, et al. v. The Life Insurance Company of Virginia, et al., Cause No. H-88-3500 (S.D. Tex. March 1990). ERISA sets forth uniform standards dealing with reporting, disclosure and fiduciary responsibility. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 91 (1983). Furthermore, ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits. Id.

The purpose of the changes in the group medical plan made by Defendants jibe with the ultimate purpose of ERISA: protection of the plan. Defendants made changes in the plan because in past years the plan suffered serious financial losses. Defendants were faced with either dropping the plan altogether or making changes. The alterations were not made to discriminate against McGann or anyone who was diagnosed with A.I.D.S.

Defendants had the right to make changes in the plan and complied with the requirement of ERISA. According to ERISA every employer must provide its employees with a summary plan description ("SPD"). 29 U.S.C. §1022(a)(1). The SPD must be written in a manner calculated to be understood by the average plan participant. 29 U.S.C. §1022(a)(1). Defendants followed these ERISA

provisions and in the SPD they handed out to their employees they included a paragraph clearly stating that the plan sponsor could terminate or amend the Plan or terminate any benefit under the Plan at any time. Therefore, beneficiaries were put on notice that from year to year their group medical plan could change.

In a similar case an insurance company completely canceled a group plan and one of the beneficiaries filed suit against the insurance company in an attempt to force it to provide insurance benefits. Hamilton v. Travelers Ins. Co., 752 F.2d 1350 (8th Cir. 1985). The Court held that the insurance company had the right to terminate the plan. Id. The insurance company had complied with the ERISA requirements, and provided an SPD which was distributed to all employees. The SPD tracked the language of the

Defendants' SPD. The court in Hamilton held that neither the employer nor the insurance company was under any contractual obligation to refrain from terminating the plan. Id. at 1351. Furthermore, the Court found that ERISA does not create liability on the part of an employer who changes the kind of health plan it provides to its employees where no contract prohibits or prevents such change. Id. at 1352. The contract provided by Defendants in the case before this Court does not prohibit or prevent any changes from being made in the group plan. Just as the Defendants can make the benefits larger for A.I.D.S. patients they can also make the benefits smaller.

Finally, the Plaintiff claims that the motion for summary judgment should be denied because there is evidence of

discrimination. Although an analysis of Plaintiff's claim of discrimination is not necessary, even using this analysis Plaintiff's claim fails.

In a Third Circuit case the court set out three requirements to prove discrimination under ERISA. avalik v. Continental Can Co., [sic] 812 F.2d 834 (3rd Cir. 1987). An employee must demonstrate (1) prohibited employer conduct, (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. Id. at 852. Plaintiff cannot prove that Defendants' conduct was prohibited. The Defendants had the right to change or terminate the medical plan under ERISA. In addition, the action was not taken to interfere with the rights of McGann but to ensure the future existence of the plan.

McGann was not entitled to health benefits whose terms never change. He was not denied any compensation for expenses related to treatment for A.I.D.S. during 1987 when the plan paid up to $1,000,000.00 for A.I.D.S. patients, nor was he denied medical compensation for insurance claims once Defendants changed the health plan in 1988. Therefore, McGann's claim of discrimination must fail.

Since Defendants have complied with the regulations of ERISA, legally have the right to make changes in its group medical plan and did not act in a discriminating manner Plaintiff's claim must fail.

For the reasons stated above, it is therefore

ORDERED that Defendants' motion for summary judgment is GRANTED.

Signed this 26th day of June, 1990 at Houston, Texas.

Norman W. Black
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN MCGANN	§	
	§	
Plaintiff	§	
	§	CIVIL ACTION
	§	NO. H-89-1995
	§	
VS.	§	
	§	
H & H MUSIC COMPANY, et al.,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

The Court having granted Defendants' motion for summary judgment, this case is here DISMISSED with prejudice.

Signed, this 26th day of June, 1990 at Houston, Texas.

Norman W. Black
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN MCGANN,	]	
	]	CIVIL ACTION NO.
	]	H-89-1995
Plaintiff	]	
	]	
vs.	]	
	]	
H&H MUSIC COMPANY,	]	
BROOK MAYS MUSIC	]	
COMPANY, AND	]	
GENERAL AMERICAN	]	
LIFE INSURANCE	]	
COMPANY	]	
	]	
Defendants.	]	

ORDER GRANTING SUBSTITUTION OF PARTY

On this day came before the Court the Motion of **FRANK GREENBERG**, Independent Executor of the Estate of **JOHN W. "JACK" MCGANN**, Deceased, to substitute as a party to this proceeding for **JOHN MCGANN**, Plaintiff, Deceased, pursuant to Federal Rule of Civil Procedure 25 (a)(1). The Court having considered the motion, finds

that substitution is necessary and therefore it is hereby

ORDERED that **FRANK GREENBERG**, Independent Executor of the Estate of **JOHN W. "JACK" MCGANN**, is substituted for **JOHN MCGANN**, Deceased, as Plaintiff in this case.

Done this 27th day of January 1992.

Norman Black
U.S. District Judge